AHMAD ABDUL RASHID & ANOR.

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOF ABDUL RASHID J
[CRIMINAL APPEAL NO. 34 OF 1981]
10 MAY 1982

CUSTOMS AND EXCISE: *Dutiable goods - Oral declaration at customs check - Untrue/ incorrect - Accused declared fresh fruits conveyed in the car - Photographic processing papers found in luggage boot - Whether Court bound to take judicial notice of all laws and regulations.*

On 10 August 1978 at about 8.30 a.m. both the accused were travelling in motor car No. MC 9117 from Singapore and on entering the Federation, declared that they had some fresh fruits in the car on being questioned by the Customs Officer. Upon examination it was discovered that there were 5 cartons of Kodak photographic processing papers being conveyed in the car. The accused were charged and convicted under s. 133(1)(a) of the Customs Act for making an untrue declaration in a particular and were sentenced to a fine of RM2,500 in default 4½ months' imprisonment. They appealed against the conviction and sentence.

Counsel for the accused argued that the learned Magistrate was wrong in law for taking judicial notice that photographic processing papers were dutiable under Customs Duties Order, 1978 (PU (A) 391/1977). In their defence 2nd accused admitted that he was entrusted to bring the 5 cartons from Singapore into the Federation and he had requested the 1st accused to drive the motor car. The 1st accused testified that he drove the car on the request of the 2nd accused where at Geylang, the 2nd accused loaded the 5 cartons into the car.

Held:

[1] It was conclusively proved that the accused declared that they had some fresh fruits on entering the Federation from Singapore when in fact the 5 cartons of Kodak photographic processing papers were conveyed in the said car.

[2] The learned Magistrate was correct when she took judicial notice that photographic processing papers were dutiable under the Customs Duties Order 1978 PU (A) 391/77.

[3] The prosecution has proved the second ingredient of s. 133 (1)(a) of the Customs Act, beyond reasonable doubt but in the light of the defence, the learned Magistrate ought to ask the question whether or not the first accused was required under the Customs Act to make any declaration in relation to the dutiable goods conveyed in the car.

[4] Clearly, the law required only those "passenger or other person" in whose possession the dutiable goods are, to make the declaration regarding the dutiable goods. In this case, it was the second accused who was in possession of the photographic processing papers whilst the first accused was not. In the circumstances, the first accused ought to have been acquitted of the charge since he had successfully rebutted the first ingredient under s. 133(1)(a) of the Act.

[5] As the second accused was indeed in possession of the dutiable goods and since he had made a declaration which was untrue or incorrect in any particular, he was rightly convicted.

[Appeal by first accused allowed; his conviction and sentence set aside. Appeal by second accused dismissed; his conviction and sentence confirmed.]

Cases referred to:
Public Prosecutor v. Yong Nam Seng & Anor. [1964] MLJ 85
SamiVellu v. Public Prosecutor [1972] 2 MLJ 28
Johnson Tan Han Seng v. Public Prosecutor [1977] 2 MLJ 66

Legislation referred to:
Customs Act 1967, ss. 103(1), 129(1), 133(1)(a)

For the appellants - Elyas Majeed
For the respondent - Hashim Yusof

JUDGMENT

Mohd. Yusof Abdul Rashid J:

The accused were convicted for making a declaration which was untrue in a particular and were sentenced to a fine of RM2,500 in default 4½ months' imprisonment. They now appeal against the said conviction and sentence.

On 10 August 1978, about 8.30 a.m. the first accused was driving a car No. MC 9117 with the second accused sitting in the front passenger seat. At the Johore Bahru Customs inward gate, lane 6, on being questioned by Encik Muniandy s/o Munnusamy, Customs Officer No. 1524 (Revenue), the accused declared that they had some fresh fruits in the car. It was discovered that in the luggage boot of the car were 4 cartons of boxes of Kodak photographic processing papers and on the floor-board of the back seat was another similar carton.

Under s. 133(1)(a) of the Customs Act, only two ingredients have to be proved, that is to say -

(i) that the accused made an oral declaration required under the Customs Act; and

(ii) that the declaration was untrue or incorrect in any particular.

In *Public Prosecutor v. Yong Nam Seng & Anor.* [1964] MLJ 85 at p. 87, Azmi J (as he then was) held that "for the purpose of s. 129(1) of the Customs Ordinance it is sufficient for the prosecution to prove that a declaration has been made and that the particulars in such declaration are untrue or incorrect." Section 129(1) referred to in that judgment has been renumbered as s. 133(1)(a) in the re-enacted Customs Act 1967. From the evidence adduced, it was conclusively proved that the accused declared that they had some fresh fruits when they entered the Federation from Singapore. However, upon examination 5 cartons of Kodak photographic processing papers were conveyed in the said car.

Now, photographic processing papers are dutiable under the Customs Duties Order, 1978 (PU (A) 391/1977) under Code 37.03.110. But the counsel for the accused on the authority of *Samivellu v. Public Prosecutor* [1972] 2 MLJ 28 contended that the learned Magistrate was wrong in law for taking judicial notice of that fact from the Customs Duties Order, 1978.

It is observed that *Samivellu's* case has been over-ruled by the Federal Court in the case of *Johnson Tan Han Seng v. Public Prosecutor* [1977] 2 MLJ 66, 69 wherein it was held -

> Counsel before us do not seek to argue to the contrary but argue that the reference P.U. (A) 148/69 should have been quoted in the charges and the prosecution should have proved by evidence that the places in which these offences were supposed to have been committed were within security areas and the failure to do so was fatal, and for this proposition they rely on a decision of the High Court in *Samivellu v. Public Prosecutor*. With respect I do not think that this case was correctly decided. Under s. 57(1)(a) of the Evidence Act, the court is bound to take judicial notice of all laws and regulations, which PU (A) 148/69 undoubtedly is, and

> therefore by virtue of s. 56 of the same Act, PU (A) 148/69 need not be proved, nor the fact that the locus in every case was in the Federation. Mohamed Azmi J fell into error in Sami Velu because he had overlooked this s. 56. Ideally the prosecution should quote PU (A) 148/69 in the charges, to help the defence and the courts, but failure to do so is not fatal. It is enough if the court's attention is directed to it and the *Gazette* produced, or even if the court of its own motion finds it for itself and has regard to it but considering its judgment. In my opinion the accused in Samivellu should not have been acquitted.

Consequently, the learned Magistrate was correct when she took judicial notice that photographic processing papers were dutiable under PU (A) 391/77.

In their defence the second accused admitted that he was entrusted to bring the 5 cartons of boxes of Kodak photographic processing papers from Singapore into the Federation. He had requested the first accused to drive motor car No. MC 9117. The first accused testified that on the request of the second accused, he drove the car from Kuala Lumpur to Singapore, where at Geylang, the second accused had the 5 cartons of boxes of Kodak photographic processing papers loaded into the car.

As stated earlier the prosecution has proved the second ingredient of s. 133(1)(a) of the Customs Act, beyond reasonable doubt but in the light of the defence, the learned Magistrate ought to ask the question whether or not the first accused was required under the Customs Act to make any declaration in relation to the dutiable goods conveyed in the car. For this purpose the provisions of s. 103(1) of the Act have to be examined. The provisions of s. 103(1) which are material for this purpose are as follows -

> (1)..... every passenger or other person arriving in ..... the Federation shall declare all dutiable ..... goods in his possession, ...

Clearly, the law required only those "passenger or other person" in whose possession the dutiable goods are, to make declaration regarding the said dutiable goods. The evidence in the instant case manifestly shows that it was the second accused who was in possession of the photographic processing papers whilst the first accused was not. In the result, the law requires the second accused to make the requisite declaration. In the circumstances, the first accused ought to have been acquitted of the charge since he had successfully rebutted the first ingredient under s. 133(1)(a) of the Act as set out earlier. As regards the second accused, since he was indeed in possession of the dutiable goods and since he had made a declaration which was untrue or incorrect in any particular, he was rightly convicted.

The learned Magistrate was lenient in imposing a fine of RM2,500 or in default 4½ months' imprisonment but since there is nothing to show that it was manifestly wrong on the part of the learned Magistrate in exercising the discretion in passing such sentence, I will not interfere.

The appeal by the first accused is allowed; his conviction and sentence are set aside. The appeal by the second accused is dismissed; his conviction and sentence are confirmed.

Also found at [1982] CLJ 417